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No. 95-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ELIZABETH PARKERSON,

Plaintiff/Petitioner

v.

STACY ELIZABETH BROOKS and
WILLIAM DAVID BROOKS,

Defendants/Respondents

On Petition For A Writ of Certiorari to the
Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Georgia Supreme Court misapplied the federal Constitution and this Court's decisions in striking down all aspects of the Georgia Grandparents' Visitation Act and all grandparents' visitation, including in four situations where the court's concerns with parental liberty would not exist.

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INTRODUCTION

In recent years, *all fifty states* have adopted grandparents' visitation statutes.[1] The over-

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[1]Ala. Code § 30-3-4 (1989); Alaska Stat. § 25.24.150 (1991); Ariz. Rev. Stat. Ann. § 25-337.01 (1991 & Supp.1993); Ark. Code Ann. § 9-13-103 (Michie 1993); Cal. Fam. Code §§ 3102, 3104 (West Special Pamphlet 1994); Colo. Rev. Stat. Ann. § 19-1-117 (West 1990 & Supp.1993); Conn. Gen. Stat. Ann. § 46b-59 (West 1986); Del. Code Ann. tit. 10, § 944(7) (1975 & Supp.1992), amended by Act of July 16, 1993, 69 Del. Laws ch. 160 (1993), sec. 1, available in LEXIS (renumbering § 950 as § 944); Fla. Stat. Ann. § 752.01 (West 1986 & Supp. 1994); Fla. Stat. Ann. § 39.4105 (West Supp. 1994); Ga. Code Ann. § 19-7-3 (Michie 1991 & Supp. 1993); Haw. Rev. Stat. Ann. §§ 571-46(7), -46.3 (Michie 1993 & Supp. 1993); Idaho Code § 32-1008 (1983); Ill. Ann. Stat. ch. 750, para. 5/607(b) (Smith-Hurd 1993), amended by Act of July 6, 1993, Pub. Act 23, 1993 Ill. Legis. Serv. 243 (West); Ill. Ann. Stat. ch. 755, para. 5/11-7.1 (Smith-Hurd 1992); Ind. Code Ann. §§ 31-1-11.7-2 to .7-8 (West 1992 & Supp.1993); Iowa Code Ann. § 598.35 (West 1981 & Supp.1994); Kan. Stat. Ann. § 38-129 (1986); Ky. Rev. Stat. Ann. § 405.021 (Michie/Bobbs-Merrill 1984); La. Rev. Stat. Ann. § 9:344 (1995); La. Children's Code arts. 1264-1268 (West Special Pamphlet 1994); Me. Rev. Stat. Ann. tit. 19, § 1003 (West Supp.1993); Md. Fam. Law Code Ann. § 9-102 (1984 & Supp.1993); Mass. Ann. Laws ch. 119, § 39D (Law.Co- op.1975 & Supp.1993); Mich. Comp. Laws Ann. § 722.27b (West 1993); Minn. Stat. Ann. § 257.022 (West 1992 & Supp.1994); Miss. Code Ann. §§ 93-16-1 to -7 (Supp.1993); Mo. Ann. Stat. § 452.402 (Vernon 1986 & Supp.1993); Mont. Code Ann. §§ 40-4-217, 40-9-101 to -102 (1993); Neb. Rev. Stat. § 43-1801 to -1803 (1988); Nev. Rev. Stat. Ann. §§ 125A.330, .340 (Michie 1993); Nev. Rev. Stat. Ann. § 432B.560(1)(c) (Michie 1991 & Supp.1993); N.H. Rev. Stat. Ann. § 458:17-d (1992 & Supp.1993); N.J. Stat. Ann. § 9:2-7.1 (West 1993), amended by Act of June 29, 1993, ch. 161, 1993 N.J. Sess. Law Serv. 453 (West); N.M. Stat. Ann. §

whelming majority of these statutes permit court- ordered grandparents' visitation merely on a showing that the visitation will be in the best interests of the child. The Georgia Grandparents' Visitation Act, however, is more protective of parental liberty than the majority of such statutes, requiring a showing of "*special circumstances* which make such visitation rights *necessary* to the best interests of the child." The Act merely creates a procedural avenue. one that is opened only by "special circumstances" making grandparents' visitation "necessary to the best interests of the child."

Despite the fact that all other state courts considering federal constitutional challenges to their (less protective) grandparents' visitation statutes have upheld the statutes, the Georgia Supreme Court held that

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40-9-1 to -4 (Michie 1989 & Supp.1993); N.Y. Dom. Rel. Law §§ 72, 240 (McKinney 1986 & Supp.1994); N.C. Gen. Stat. §§ 50- 13.2(b1), .2A, .5(j) (1987 & Supp.1993); N.D. Cent. Code § 14-09-05.1 (1991 & Supp.1993); Ohio Rev. Code Ann. §§ 3109.051, .11, .12 (Baldwin 1992); Okla. Stat. Ann. tit. 10, §§ 5, 60.16 (West 1987 & Supp.1994); Or. Rev. Stat. §§ 109.121, .123 (1993), amended by Act of Apr. 30, 1993, 1993 Or. Laws ch. 33. sec. 291, available in LEXIS; 23 Pa. Cons. Stat. Ann. §§ 5311-5314 (1991 & Supp.1993); R.I. Gen. Laws §§ 15-5-24.1 to -24.3 (1988), amended by Act of July 1, 1993, 1993 R.I. Pub. Laws ch. 52, sec. 1, available in LEXIS; S.C. Code Ann. § 20-7-420(33) (Law.Co-op.1985); S.D. Codified Laws Ann. §§ 25-4-52, -54 (1992). Tenn. Code Ann. § 36-6-301 (1991); Tex. Fam. Code Ann. § 14.03(e)-(f) (West 1986 & Supp.1994); Utah Code Ann. § 30-5-2 (1989 & Supp.1993), amended by Act effective May 3, 1993, 1993 Utah Laws ch. 152, sec. 2; Vt. Stat. Ann. tit. 15, §§ 1011-1016 (1989 & Supp.1993); Va. Code Ann. § 20-107.2 (Michie 1990 & Supp.1993); Wash. Rev. Code Ann. § 26.09.240 (West 1986 & Supp.1994); W.Va. Code §§ 48-2B-1 to -2B-9 (1992 & Supp.1993); Wis. Stat. Ann. § 767.245 (West 1993); Wis. Stat. Ann. § 880.155 (West 1991); Wyo. Stat. § 20-7-101 (Supp.1993); Wyo. Stat. § 20-2-113(c) (1987 & Supp.1993).

the Georgia statute, in every aspect, violated the federal Constitution by infringing on parental liberty.

The Georgia Supreme Court's decision unnecessarily conflicts with the decisions of this Court on parental liberty. It precludes all grandparent visitation procedures, under any circumstances, despite the fact that there are at least four situations in which there is no clash at all between parental liberty and the grandparent-grandchild relationship. The Georgia Supreme Court decision also unnecessarily conflicts with the decisions of other state courts of last resort on the federal constitutionality of grandparents' visitation statutes.

In the midst of the breakdown of so many families and child abuse at record levels, *children need their grandparents* more than ever.

OPINIONS BELOW

The decision of the Georgia Supreme Court is the first decision to invalidate a Grandparents' Visitation Act on federal constitutional grounds, and is reported at 454 S.E.2d 769 (1995) (App. I at A-1). The decision of the trial court is not reported (App. II at A-21).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. An order denying defendants/ respondents' motion to dismiss was entered by the trial court on April 29, 1994. The Georgia Supreme Court reversed on March 17, 1995.

STATUTE INVOLVED

This petition involves the Georgia Grandparents' Visitation Act, codified at Ga. Code § 19-7-3. The Act is quoted in full in the Appendix (App. III at A-29). The Act permits natural grandparents (i) to file an original action for visitation rights or (ii) to intervene in any existing action involving visitation with

or custody of the child. The Act authorizes a court to grant reasonable visitation rights upon proof of "special circumstances" which make such visitation "necessary to the best interests of the child." The Act emphasizes that there is to be no presumption in favor of visitation by any grandparents, and that the court has discretion to deny visitation. The Act prohibits more than one action seeking visitation in any two-year period. Finally, the Act allows parents to seek revocation or amendment, for good cause, of any grant of grandparents' visitation.

STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS

Petitioner Elizabeth Parkerson is the maternal grandmother of the child of Respondents Stacy Elizabeth Brooks and William David Brooks. When respondents denied Mrs. Parkerson all access to her grandchild, Mrs. Parkerson sought the aid of the Georgia courts under the Georgia Grandparents' Visitation Act.

1. Trial Court

In the trial court, defendants moved to dismiss Mrs. Parkerson's petition, arguing that the Georgia Grandparents' Visitation Act was unconstitutional under the United States and Georgia Constitutions. The trial court overruled the constitutional challenge and denied the motion to dismiss. Slip op. at 8, App. II at A-28.

The trial court agreed with respondents that "care of and authority over children by their parents involves fundamental liberty interests." Slip op. at 2 & n.1, App. II at A-22.[2] But the trial court not

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[2]Citing Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Prince v. Massachusetts, 321 U.S. 158 (1944); Wisconsin v. Yoder, 406 U.S. 205 (1972).

ed that "the United States Supreme Court has made it clear that the protection of the autonomy of parents is by no means immune from state interference." Slip op. at 3 & n.3, App. II at A-23.[3] More specifically, the trial court noted that this Court has never entertained a case involving visitation rights of grandparents or third parties. Slip op. at 3, App. II at A-22.

In the absence of a specific decision by this Court or the Georgia Supreme Court, the trial court analyzed the decisions of the high courts of two other states, one upholding a grandparents' visitation statute and the other striking down a similar statute. *King v. King*, 828 S.W.2d 630 (Ky.), *cert. denied*, 113 S. Ct. 378, 121 L. Ed. 2d 289 (1992) (upholding Kentucky statute against federal and state constitutional challenge); *Hawk v. Hawk*, 855 S.W.2d 573 (Tenn. 1993) (striking down Tennessee statute on state constitutional grounds).[4] In *King*, the Kentucky Supreme Court concluded that the Kentucky grandparents' visitation statute adequately protected parents' due process rights by requiring a judicial hearing to determine whether the best interests of the child would be served by permitting grandparents' visitation. 828 S.W.2d at 632. By contrast, construing a nearly identical statute, the Tennessee Supreme Court concluded that a "best interests of the child" standard did not adequately protect parental rights under the state constitution; the court insisted that grandparents should be required to show also that harm to the child would result if visitation were not permitted. *Hawk*, 855 S.W.2d at 582.

The trial court concluded that the Georgia statute satisfied even the more stringent standard imposed by the Tennessee Supreme Court, pointing out that the Geor-

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[3]Citing Pierce, 268 U.S. 510; Prince, 321 U.S. 158.

[4]The Tennessee Supreme Court based its decision in Hawk solely on the privacy right conferred by the Tennessee Constitution, and not on any alleged federal right.

gia statute "is not a simple 'best interests' standard." Slip op. at 6, App. II at A-26. Instead, the Georgia statute requires grandparents to prove "*special circumstances* which make such visitation rights *necessary to the best interests of the child.*" Slip op. at 5, App. II at A-25 (original emphasis). Interpreting the statutory language, the trial court adopted a two-step approach to grandparents' visitation cases, in an effort "to ensure due process in [the statute's] application:"

> 1) The Court will determine whether "special circumstances exist in relation to the grandparent's request for visitation and, if so, such special circumstances will be articulated with specificity in findings of fact (unless waived by the parties).
>
> 2) In the event of the existence of such special circumstances, the Court will balance the parents' fundamental liberty interest against the State's interest in protecting the welfare of the child, and in so doing, reach conclusions of law as to whether the special circumstances make the requested visitation rights "necessary to the best interests of the child."

Slip op. at 6-7, App. II at A-26. The trial court went on to impose a "clear and convincing evidence" standard of proof on grandparents. Slip op. at 7-8, App. II at A-28.[5]

Having articulated this construction of the Georgia Grandparents' Visitation Act that is solicitous of parents' rights regarding their children, the trial court upheld the constitutionality of the Act and denied respondents' motion to dismiss Mrs. Parkerson's petition for visitation rights.

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[5]Citing Santosky v. Kramer, 455 U.S. 745 (1982).

2. Georgia Supreme Court

The Georgia Supreme Court reversed, striking down the Act, among other grounds, as unconstitutional under the federal constitution. 454 S.E.2d at 774, App. I at A-8. The court first surveyed the same parental liberty decisions of this Court that had been discussed by the trial court. 454 S.E.2d at 771, App. I at A-4. The court then adopted the same constitutional standard adopted by the Tennessee Supreme Court in *Hawk*:

> [S]tate interference with a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child.

454 S.E.2d at 772, App. I at A-6.[6]

The Georgia Supreme Court then concluded perfunctorily that the Georgia Grandparents' Visitation Act failed to meet the federal constitutional standard. The court gave two reasons for its holding:

> First, while as noted above, the state may, in limited instances, interfere with parental decision-making to protect the health or welfare of children, there is insufficient evidence that supports the proposition that grandparents' visitation with their grandchildren always promotes the children's health or welfare. . . .
>
> However, even assuming grandparent visitation promotes the health and welfare of the child, the state may only impose that visitation over the parents' objections on a show-

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[6]Citing Bean, Grandparent Visitation: Can the Parent Refuse?, 24 J. Fam. L. 393, 407-13 (1985-86); Hawk, 855 S.W.2d at 580-81; Yoder, 406 U.S. at 230; Pierce, 268 U.S. at 534; Meyer, 262 U.S. at 402-03; Prince, 321 U.S. at 170.

> ing that failing to do so would be harmful to the child.

454 S.E.2d at 773, App. I at A-7-8. Having set up an impossible standard ("always") for any statute to meet, the Georgia court found it unnecessary to consider the powerful evidence that grandparents are important to most children (Part II.B.).

The Georgia Supreme Court ignored the clear constitutionality of the law when parents' rights have been suspended or terminated, and did not address at all the Georgia statute's requirements of "special circumstances" and a showing that visitation was "necessary" to the best interests of the child. Nor did the court explain at all its failure or refusal to adopt the narrowing construction proposed by the trial court, rather than striking down the entire statute as a violation of the United States Constitution.

B. STATEMENT OF THE FACTS

Because this case has proceeded no further than a motion to dismiss, the facts in the record are only those few that are agreed on by the parties or stated in the original Petition for Grandparent's Visitation Rights. The trial court recited the agreed facts:

> 1) Defendants are the natural parents of the subject child and are currently married.
> 2) Plaintiff is the maternal grandmother.
> 3) Defendants jointly desire to preclude contact between the subject child and the plaintiff, and, as a result, plaintiff brings this action for court-ordered grandparent visitation pursuant to O.C.G.A. § 19-7-3.

Slip op. at 1, App. II at A-21.

In addition, the Petition discloses that "the subject child" is a four-year old girl, that her parents were separated at the time of the Petition, that the child and her mother had occasionally resided with Mrs.

Parkerson during the child's life, that Mrs. Parkerson occasionally provided maintenance and support for the child and the mother, and that the parents denied Mrs. Parkerson any further contact with the child following a difference of opinion on matters unrelated to the child.

REASONS FOR GRANTING THE WRIT

Review on writ of certiorari is appropriate in this case because the Georgia Supreme Court has decided a federal question -- the constitutionality of grandparents' visitation acts -- in a way that conflicts with the decisions of numerous other state courts of last resort; because this is an important question of federal law that has not been, but should be, settled by this Court; and because the Georgia Supreme Court decided this important federal question in a way that conflicts with applicable decisions of this Court. Grandparents' visitation acts exist in all 50 states, and have been and are being challenged in a number of jurisdictions under the federal Constitution, so that direction from this Court is required.

I. THE GEORGIA SUPREME COURT MISAPPLIED THE FEDERAL CONSTITUTION AND THIS COURT'S DECISIONS, AND ERRONEOUSLY STRUCK DOWN ALL GRANDPARENT VISITATION, INCLUDING AT LEAST FOUR SITUATIONS IN WHICH THE GEORGIA SUPREME COURT'S CONCERN ABOUT A CLASH WITH PARENTAL LIBERTY WOULD NOT EXIST.

The Georgia Supreme Court's concern was to ensure that parental liberty would not be overridden by the grandparent-grandchild relationship absent a showing that (i) grandparent visitation would promote the health or welfare of the child and (ii) the absence of grandparent visitation would be harmful to the child. 454 S.E.2d at 774, App. I at A-8.

Even assuming that the Georgia Supreme Court correctly construed the Act as not including these procedural protections,[7] the court overreacted in

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[7] In fact, the Georgia Supreme Court's construction of the Act is not correct. As the trial court recognized, the language of the Act ("*special*

striking down the statute in all situations. There are at least four situations in which the Grandparents' Visitation Act does not result in any clash between parental liberty and the grandparent-grandchild relationship: where (i) parental rights are being terminated; (ii) parental rights are being suspended; (iii) parental rights legitimately could be terminated or suspended; and (iv) special situations where the grandparent can play a beneficial monitoring role.

A. The Georgia Supreme Court Erred in Precluding Grandparent Visitation Even Where Parental Rights Have Been Terminated.

More and more frequently, parents are forfeiting their parental rights by neglecting, abandoning, or abusing their children. In those situations, the state steps in to protect the children under its parens patriae power, and takes steps to terminate permanently the parents' rights. Such permanent termination is constitutional, so long as due process is afforded to the parents. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

Should the state demonstrate the natural parents' unfitness, the parents' rights with regard to their children are ended. *See Santosky*, 455 U.S. at 759 ("When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it."); *id.* ("Once affirmed on appeal, a New York decision terminating parental rights is *final* and irrevocable.") (original emphasis); *id.* at 761 ("But for the natural parents, a finding of permanent neglect can cut off forever their rights in their child.").

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circumstances which make such visitation rights *necessary* to the best interests of the child") compel, or at least allow, a construction requiring just the procedural protections insisted upon by the Georgia Supreme Court. However, Petitioner recognizes that it is not the function of this Court to review the state court's construction of the Act.

Once parental rights are terminated, there can be no further clash of those rights with the child's or the grandparents' rights in grandparents' visitation. *E.g., Santosky*, 455 U.S. at 761 (foster parents can seek custody of child after judge has decided the issue of permanent neglect against natural parents and is focusing on the placement that would serve the child's best interests).

The proposition is elementary: where parents' rights have been terminated, either voluntarily or involuntarily, there is no constitutional reason to prevent grandparents from seeking visitation with their grandchildren. The Georgia Supreme Court, however, has decreed that the United States Constitution forbids grandparents from seeking visitation in such circumstances. The Georgia Supreme Court's decision should therefore be reversed in part.

B. The Georgia Supreme Court Erred in Precluding Grandparent Visitation Even Where Parental Rights Have Been Suspended.

Just as permanent loss of parental rights is constitutional in appropriate circumstances, so is temporary loss of parental rights. For example, children who have been abused or neglected may be placed in foster care, after appropriate adversary judicial hearing. *See Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 828 (1977).

Where such temporary loss of parental rights has occurred and parental rights have been temporarily suspended, there is for that period of time no possible clash between parental liberty and the rights served by grandparent visitation.[8]

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[8]Nor is there any clash between the foster parents' rights and the grandparents' or grandchild's rights. Foster parents' rights have their source in state law and contractual arrangements, so that foster parents have only "the most limited constitutional

Thus, the Georgia Supreme Court erred in interpreting the United States Constitution effectively to preclude grandparents from seeking visitation rights where their grandchildren have been placed in foster care (or where the parents' rights have otherwise been temporarily suspended). The Georgia Supreme Court's decision should therefore be reversed in part.

C. The Georgia Supreme Court Erred in Precluding Grandparent Visitation Even Where Grandparents Can Show that Parental Rights Legitimately Could Be Terminated or Suspended.

In many situations, parents will have neglected or abused their children to such an extent that the state could make the requisite showing to justify termination or suspension of parental rights, but the state will not yet have pursued the case due to a scarcity of resources and time. In such cases, grandparents who are personally interested in the grandchildren's welfare will have the ability and incentive to move more quickly than state agencies to bring the children's condition to the attention of the appropriate court. If the grandparent can demonstrate to the court the same facts that would authorize an order terminating or suspending parental rights, there is no reason that the grandparent should not be permitted visitation with the grandchildren.

It would be strange indeed if facts justifying highly intrusive remedies such as temporary or permanent removal of children from their parents' home cannot also justify the much less intrusive remedy of grandparents' visitation. In fact, permitting grandparents' visitation could well be an intermediate remedy that in some cases might bring about a resolution of the abuse or neglect, so that the child can remain in the home and the family relationship can be restored. Absent grandparent visitation, the parent-child relationship might continue to deteriorate, so that termination or

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'liberty.'" Smith, 431 U.S. at 845-46.

suspension of parental rights unnecessarily results.

The Georgia Supreme Court effectively has adopted this strange approach, precluding less intrusive (and probably more beneficial) grandparents' visitation even where facts exist justifying more intrusive termination or suspension of parental rights. The Georgia Supreme Court erred in holding that the federal Constitution requires this strange result, and its decision should therefore be reversed in part.

D. The Georgia Supreme Court Erred in Precluding Grandparent Visitation Even in Special Circumstances that Justify Grandparents' "Beneficial Monitoring."

Many children live in environments that have not yet reached a level requiring formal termination or suspension of parental rights, but the children nevertheless would be harmed by the absence of grandparents' visitation. Even a commentator who disapproves of most states' grandparents' visitation statutes (regarding them as too intrusive on parental liberty) recognizes the need for grandparents' visitation in situations other than formal termination or suspension of parental rights. *See* Fernandez, *Grandparent Access: A Model Statute*, 6 Yale L. & Pol'y Rev. 109, 112 & n.12 (1988) (suggesting that grandparents in some situations "may play a beneficial role in monitoring a nuclear family experiencing difficulty in ways potentially harmful to the child"; "For example, a child residing with an abusive or neglectful parent whose conduct is not so extreme as to warrant removal of the child from the home might benefit from court-ordered grandparent access.").

Examples of situations in which beneficial monitoring by a grandparent would not infringe parental liberty include parental abuse or neglect that endangers the child's well-being; parental inability to control the child; and parental alcoholism or addiction to

drugs.[9]

The Georgia Supreme Court's erroneous interpretation of the federal Constitution precludes all grandparent visitation in circumstances where a beneficial monitoring presence would prevent harm to the child and would serve the child's best interests. The Georgia Supreme Court's decision should therefore be reversed in part.

II. DECISIONS OF NUMEROUS OTHER STATE COURTS OF LAST RESORT, AS WELL AS

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[9]The model statute proposed in the Yale Law & Policy Review article provides:

> In the absence of a significant relationship with the grandparent, the court may consider granting grandparent access in the following exceptional circumstances:
> (1) The parent or the spouse or cohabitor of the parent has abused or neglected the child in such a way that endangers the child's well-being, and grandparent access will serve as a beneficial monitoring presence in conjunction with or in lieu of state supervision,. If the grandparent has engaged in abusive or neglectful behavior toward either the child or the parent when he or she was a child, this section shall not apply;
> (2) The child has been adjudicated "a child in need of supervision" or "delinquent" and grandparent access will serve as a beneficial monitoring presence in conjunction with state supervision; or
> (3) The parent is an alcoholic or addicted to illegal substances and grandparent access will serve as a beneficial monitoring presence.
> If any of the above circumstances apply, the court will consider the enumerated criteria in Section III(b) to determine whether grandparent access will be in the child's best interests.

6 Yale Law & Pol. Rev. at 134.

THE SCHOLARLY LITERATURE, RECOGNIZE THE CRITICAL BENEFITS TO THE CHILD FROM GRANDPARENTS' VISITATION.

A. The Georgia Supreme Court's Decision Conflicts with the Decisions of All Other State Courts that Have Considered the Validity of Grandparents' Visitation Statutes under the United States Constitution.

The Georgia Supreme Court's decision stands alone. It conflicts with the decisions of every other state court that has addressed the federal constitutional issue. All state courts of last resort have upheld grandparents' visitation statutes under the federal constitution. *See Lehrer v. Davis*, 571 A.2d 691 (Conn. 1990); *King*, 828 S.W.2d 630; *Herndon v. Tuhey*, 857 S.W.2d 203 (Mo. 1993) (en banc); *Roberts v. Ward*, 493 A.2d 478 (N.H. 1985); *Mimkon v. Ford*, 332 A.2d 199 (N.J. 1975); *Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981). All state intermediate appellate courts have likewise upheld grandparents' visitation statutes under the federal constitution. *E.g.*, *Sketo v. Brown*, 559 So. 2d 381 (Fla. App. 1990); *Bailey v. Menzie*, 542 N.E.2d 1015 (Ind. App. 1989); *Spradling v. Harris*, 778 P.2d 365 (Kan. App. 1989); *Fairbanks v. McCarter*, 622 A.2d 121 (Md. 1993); *R.T. v. J.E.*, 650 A.2d 13 (N.J. Super. 1994).[10]

The Georgia Supreme Court's decision is even more anomalous given that the Georgia statute is more protective of parental liberty than most of the grandparents' visitation statutes upheld in other states.

B. The Cases Acknowledge that Children's Best Interests Are Furthered by Grandparents' Visitation.

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[10]The only state court to strike down a grandparents' visitation statute did so solely on state constitutional grounds. Hawk, 855 S.W.2d at 582.

The Georgia Supreme Court simply was wrong that there is a lack of evidence of the benefits of grandparents' visitation. 454 F.2d at 773, App. I at A-7. Other states' courts have had no difficulty in finding substantial benefits from grandparents' visitation.

Perhaps the most often quoted description of those benefits is from the New Jersey Supreme Court's 1975 decision:

> Grandparents ordinarily play a very different role in the child's life; they are not authority figures and do not possessively assert exclusive rights to make parental decisions. At best, they are generous sources of unconditional love and acceptance, which complements rather than conflicts with the roles of the parents.
>
> . . . .
>
> It is biological fact that grandparents are bound to their grandchildren by the unbreakable links of heredity. It is common human experience that the concern and interest grandparents take in the welfare of their grandchildren far exceeds anything explicable in purely biological terms. A very special relationship often arises and continues between grandparents and grandchildren. The tensions and conflicts which commonly mar relations between parents and children are often absent between those very same parents and their grandchildren. Visits with a grandparent are often a precious part of a child's experience and there are benefits which devolve upon the grandchild from the relationship with his grandparents which he cannot derive from any other relationship. Neither the Legislature nor this Court is blind to human truths which grandparents and grandchildren have always known.

Mimkon, 332 A.2d at 204-05. *See also Moses v. Cober*, 641 N.E.2d 668, 672 (Ind. App. 1994) ("We find

the statement of the supreme court of New Jersey insightful and adopt its view as supporting the activities of our legislature.").

One legal commentator has described the research supporting *Mimkon*'s description of grandparent-grandchild relationships:

> As the court opinion [in *Mimkon*] recognizes, for many children, the relationships that develop with their grandparents are happy ones; visitation means special treats, doting attention, and much affection without the day-to-day conflicts that often arise in the parent-child context. Some children, however, will miss out on this bonding process, or have it prematurely terminated, due to irreconcilable differences between their parents and grandparents.
>
> Research supports the intuitive assumption that children who are deprived of this bonding process lose something valuable. Social scientists have identified at least four "symbolic" roles that help explain the ways in which grandparents influence their families. The "being there" role requires nothing more than a grandparent's presence and may help younger generation members in two ways. First, this presence "mitigates against the obtrusive events of the outside world and disruptive events of role transitions. . . . [and] serves to maintain the identity of the family." In times of transition, such as after the birth of a sibling or during divorce, a grandparent's presence may exert a calming influence on grandchildren. Second, just by being there, grandparents provide an important stabilizing influence particularly important for children born of early teenage mothers.
>
> The second symbolic role played by grandparents is that of "family watchdog." In this role, the grandparent is alert for signs

> of abuse or neglect that might indicate that the family will need active care and protection. Third, an "arbitrating" role may be assumed when grandparents actively negotiate between parents and children concerning values and behaviors that may be more central, in the long run, to family continuity and individual enhancement than those that the parents' authority status allow to be expressed. Such negotiation may also occur when grandparents downplay volatile or disruptive differences between parents and children. The fourth important symbolic role for grandparents is as "interpreters" of the family's history. Grandparents may help grandchildren build connections between the family's past, present, and future, which help children form a firmer sense of identity.
>
> Beyond these symbolic roles, grandparents can serve a much different function in families that are unstable due to abuse or neglect. In these cases, grandparents may be able to provide stability for the children by monitoring the situation. Such monitoring, depending on the severity of the problem, may be in lieu of, or in addition to, state supervision. Children in these situations may be better able to cope with a less-than-ideal family environment when grandparents provide them with unconditional affection, support, and attention. Grandparents may also be of assistance to children who have been deemed by the state "delinquent" or "in need of supervision."

Fernandez, 6 Yale L. & Pol'y Rev. at 109-110 (citing and quoting Bengtson, *Diversity and Symbols in Grandparental Roles*, in *Grandparenthood* 21 (V. Bengston & J. Robertson eds. 1985)).

The Kentucky Supreme Court has described the legislative justifications for grandparents' visitation

statutes:

> Under ordinary circumstances, few would dispute that there are benefits to be derived from the establishment of a bond between grandparent and grandchild. . . .
>
> In an era in which society has seen a general disintegration of the family, it is not unreasonable for the General Assembly to attempt to strengthen familial bonds. . . . [T]he grandparents' visitation statute was an appropriate response to the change in the demographics of domestic relations, mirrored by the dramatic increase in the divorce rate and in the number of children born to unmarried parents, and the increasing independence and alienation within the extended family inherent in a mobile society.
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> . . . .
>
> . . . [T]he General Assembly determined that, in modern day society, it was essential that some semblance of family and generational contact be preserved. If a grandparent is physically, mentally and morally fit, then a grandchild will ordinarily benefit from contact with the grandparent. That grandparents and grandchildren normally have a special bond cannot be denied. Each benefits from contact with the other. The child can learn respect, a sense of responsibility and love. The grandparent can be invigorated by exposure to youth, can gain an insight into our changing society, and can avoid the loneliness which is so often a part of an aging parent's life.

King, 828 S.W.2d at 631-32.

The New Hampshire Supreme Court has done the same:

> One of the frequent consequences, for children, of the decline of the traditional nuclear family is the formation of close personal

> attachments between them and adults outside of their immediate families. Stepparents, foster parents, grandparents and other caretakers often form close bonds and, in effect, become psychological parents to children whose nuclear families are not intact.
>
> . . . .
>
> . . . The importance to children of stability and continuity in their close relationships is well recognized. "Psychiatrists and psychologists . . . unanimously counsel that children should maintain and retain meaningful relationships and that to deny them continuing contacts is a deprivation. . . . Stability, continuity, and opportunity, of and for meaningful associations are said to build a healthy psyche." Foster and Freed, *The Child's Right to Visit Grandparents*, Trial, March 1984, at 38.

Roberts, 493 A.2d at 481-82.

C. The Scholarly Literature Acknowledges that Children's Best Interests Are Furthered by Grandparents' Visitation.

One legal commentator summarized the sociological literature on grandparent-grandchild relationships as follows:

> Sociological literature has documented and analyzed the benefits children receive from a healthy relationship with their grandparents. Contact with grandparents produces children who are rooted in and proud of their family and culture, emotionally secure, and highly socialized. Additionally, interaction between grandparents and grandchildren mitigates ageism in children because older people love them, mitigates sexism because grandmothers and grandfathers do essentially the same thing, and eliminates fear of old age because grandparents serve as ancestor role models.

> Finally grandparents can give grandchildren "an emotional sanctuary from the everyday world." These findings are consistent with those of other experts on child development who generally agree that it is important for children to maintain ongoing meaningful relationships.

Zablotsky, *To Grandmother's House We Go: Grandparent Visitation after Stepparent Adoption*, 32 Wayne L. Rev. 1, 46 (1985), quoted in *In re Whitaker*, 522 N.E.2d 563, 567 n.3 (Ohio 1988).

Another researcher, citing numerous sociological sources, listed several valuable functions of grandparents:

> Grandparents are valued for their backup, watchdog, safety valve, and stabilizing functions in divorce and other family disruptions.

V. Kivett, *The Grandparent-Grandchild Connection*, 16 Marriage & Fam. Rev. 267, 274 (1991) (citing generally C. Johnson, *A Cultural Analysis of the Grandmother*, 5 Res. on Aging 547 (1983); R. Albrecht, *The Parental Responsibilities of Grandparents*, 16 Marriage & Fam. Living 201 (1954); G. Hagestad, *Continuity and Connectedness*, in *Grandparenthood* 31 (V. Bengston & J. Robertson eds., 1985); L. Troll, *Grandparents: The Family Watchdogs*, in *Family Relationships Later in Life* 63 (T. Brubaker ed., 1983)).

Dr. Arthur Kornhaber, psychiatrist and founder of The Foundation for Grandparenting, conducted a study focusing directly on the grandparent-grandchild tie. The results showed that children with close ties to their grandparents were more comfortable with the elderly and more secure emotionally than other children. A. Kornhaber & K. Woodward, *Grandparents/Grandchildren --The Vital Connection* (1981). Dr. Kornhaber also concluded that grandparent visitation makes children

less vulnerable to abuse by parents and to self-abuse (including suicide), because grandparents are "the first line of support when children have problems with their parents." *Grandparent's Visitation Rights: Hearings on S. Con. Res. 40 Before the Subcommittee on Separation of Powers of the Comm. on the Judiciary*, 98th Cong., 1st Sess. 35-36 (1983).

Finally, legal commentators have recognized that grandparent visitation is important in preventing child abuse.

> Even outside the teenage pregnancy context, the presence of a monitoring relative may help prevent child abuse. The number of reported child abuse cases has risen dramatically from 8,000 cases in 1968 to 850,000 cases in 1981. As one commentator points out, increasing grandparent access to children may be useful in eliminating such abuse in two ways. First, it may reduce the social isolation of the parent-child relationship. Such isolation is thought to be a contributing cause of abuse. Second, mistreated children may recover better if they have a continuous relationship with an adult who can provide "compensatory acceptance, nurturance, and a positive mode for social experiences."

Fernandez, 6 Yale L. & Pol'y Rev. at 116-17 (citing and quoting Ingulli, *Grandparent Visitation Rights: Social Policies and Legal Rights*, 87 W. Va. L. Rev. 295, 306-07 (1985)).

The Georgia Supreme Court dismissed the benefits of grandparents' visitation only by ignoring this large body of scholarship.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Georgia Supreme Court should be granted, and the decision of that court should be re-

versed in part.

Dated June 15, 1995.

Respectfully submitted,

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APPENDIX

APPENDIX

I. GEORGIA SUPREME COURT OPINION A-1

II. TRIAL COURT ORDER A-21

III. STATUTE A-29

APPENDIX I. GEORGIA SUPREME COURT OPINION

In the Supreme Court of Georgia

Decided: March 17, 1995

S94A1451. BROOKS ET AL. V. PARKERSON
[Reported at 454 S.E.2d 769]

*770 HUNT, Chief Justice.

This appeal presents the issue of the constitutionality of Georgia's "Grandparent Visitation Statute," OCGA § 19-7-3. We hold that the statute is unconstitutional under both our state and federal constitutions, and reverse the trial court's order to the contrary.

Patterson, the child's maternal grandmother, filed a petition for visitation under OCGA § 19-7-3. The petition was opposed by both the child's parents, Stacy and William Brooks, who filed a motion to dismiss, challenging the constitutionality of the statute. We granted the parents' application to appeal from the trial court's denial of that motion, and asked the parties to address the issues of the constitutionality of the statute and, assuming its constitutionality, the appropriate burden of proof in grandparent visitation cases.[1] Because we find the statute unconstitutional, we need not reach the second question.

1. The Statute

The Grandparent Visitation Statute, OCGA § 19-7-3, enacted substantially in its present form in 1988,[2]

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[1]The trial court held the statute is constitutional and that grandparents have a burden of proving the appropriateness of visitation by clear and convincing evidence.

[2]At common law grandparents had no legal right of visitation with their grandchildren over the

2. Constitutionality of the Statute.

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objections of the parents. See Note, Grandparents' Visitation Rights In Georgia, 29 Emory Law Journal 1083 (1980). The first Grandparents' Visitation Statute was enacted in this state in 1976, allowing the trial court, in its discretion, to grant reasonable visitation rights to a grandparent whenever the court had before it a question concerning the custody or guardianship of a child. Ga.Code Ann. § 74-112 (1976) (Ga.L.1976, p. 247, § 1). The statute was amended and expanded in 1980 to authorize the trial court to grant reasonable visitation to grandparents in an existing case where the guardianship of a minor child was in issue, or where one parent had died and the survivor remarried, or where the parental rights of one of the parents had been terminated. Grandparents have the right to intervene in an existing action, or to file an original pleading if the grandparent was the parent of the minor child's deceased parent or the parent of the minor child's parent whose parental rights had been terminated. 1980 Ga.L. 936-937. See Smith v. Finstad, 247 Ga. 603, 277 S.E.2d 736 (1981) upholding the constitutionality of the 1980 statute against a challenge that the retroactive application of that statute was unconstitutional. The 1980 statute gave grandparents the right to initiate an original action for visitation under limited circumstances. For a history of grandparent visitation in Georgia through 1980, see Note, 29 Emory Law Journal 1083, supra. The current statute allows a grandparent to bring an action for visitation under any circumstances (this has been referred, in some instances, to an "open-ended" grandparent visitation statute, see Bohl, Brave New Statutes: Grandparent Visitation As Unconstitutional Invasions of Family Life and Invalid Exercises of State Power, 3 George Mason Univ. Civil Rights L.Journal 271, 289 (1992)), except that an original petition may not be filed more than once in any two-year period. OCGA § 19-7-3(c).

In recent years legislatures in all fifty states have enacted statutes giving grandparents visitation rights. See Comment, The Coming Of Age Of Grandparent Visitation Rights, 43 The American University L.Rev. 563, 564 (1994).[3] A number of legal scholars, including the justices of the supreme courts of Tennessee, Kentucky and Missouri have debated both the advisability and constitutionality of these statutes.[4]

In examining the constitutionality of our state's grandparent visitation statute, we examine first the interest which is constitutionally protected and, second the extent to which the state may infringe on that interest. Finally, we consider whether the statute is within the permissible scope of state infringement. In so doing, we are mindful of the rule that legislative enact-

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[3]For some of the reasons behind the proliferation of these statutes, see Comment, The Coming of Age of Grandparent Visitation Rights, 43 The American Univ.L.Rev. 563, fns. 3-7 (1994); Fernandez, Grandparent Access: A Model Statute, 6 Yale Law and Policy Rev. 109, 115-117 (1988). We also note that in 1983, the U.S. Congress passed a resolution calling for the adoption of a uniform state act on grandparent visitation rights. S.Con.Res. 40, 98th Cong. 1st Sess. 129 Cong.Reg. 13, 487 (1983).

[4]See generally Bohl, supra, n. 1; Fernandez, supra, n. 2; Note, The Constitutional Constraints on Grandparents' Visitation Statutes 86 Columbia L.Rev. 118 (1986); Bean, Grandparent Visitation: Can the Parent Refuse?, 24 Journal of Family Law 393 (1985-86); Zaharoff, Access to Children: Towards a Model Statute for Third Parties, 15 Family Law Quarterly 165 (1981); Hawk v. Hawk, 855 S.W.2d 573 (Tenn.1993); (holding unconstitutional Tennessee's grandparent visitation statute under the Tennessee constitution); Herndon v. Tuhey, 857 S.W.2d 203 (Mo.1993) (upholding Missouri's grandparent visitation statute); and King v. King, 828 S.W.2d 630 (Ky.1992) (upholding Kentucky's grandparent visitation statute).

ments are presumptively constitutional. Luther v. State, 255 Ga. 706, 707, 342 S.E.2d 316 (1986).

(a) The Protected Interest.

The U.S. Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without undue state interference. Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923) (state law prohibiting teaching in school of any modern language except English held unconstitutional. The liberty interest guaranteed by the Fourteenth Amendment includes freedom "to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children."); Pierce v. Society of Sisters, 268 U.S. 510, 534- 35, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925) (law prohibiting parents from sending children to private rather than public schools unconstitutional because it would "unreasonably interfere with the liberty of parents ... to direct the upbringing and education of [their] children."); Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944) (child labor laws prohibiting female children under the age of eighteen from selling magazines and periodicals constitutional notwithstanding that "the custody, care and nurture of the child reside first in the parents.... [I]t is in recognition of this that [our] decisions have respected the private realm of family life which the state *772 cannot enter...."); Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968) (the Court recognized general parental authority over children but upheld the state law limiting the availability of sex materials to minors); Stanley v. Illinois, 405 U.S. 645, 651-52, 92 S.Ct. 1208, 1212-13, 31 L.Ed.2d 551 (1972) (holding unconstitutional the Illinois law declaring that on death of the mother, children of unwed fathers become wards of the state. The Court noted that it had found protection of the family unit under the due process and equal protection clauses of the Fourteenth Amendment, and under the privacy aspects of the Ninth Amendment); Wisconsin v. Yoder, 406 U.S. 205, 235, 92 S.Ct. 1526, 1543, 32 L.Ed.2d 15 (1972) (exempting Amish

from the state compulsory education law requiring children to attend school beyond the eighth grade); Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 1394, 71 L.Ed.2d 599 (1982) (in determining the standard of proof necessary in termination of parental rights case, the Court noted its "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.... The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."). Although the parents' right to rear children without state interference is largely expressed as a "liberty" interest, the Supreme Court has also noted that that right derives from privacy rights inherent in the constitution. See Prince v. Massachusetts, supra, 321 U.S. at 166, 64 S.Ct. at 442. Hawk v. Hawk, supra, n. 3, at 578-79. Parents have comparable interests under our state constitutional protections of liberty and privacy rights. "The right to the custody and control of one's child is a fiercely guarded right in our society and in our law. It is a right that should be infringed upon only under the most compelling circumstances." In Re: Suggs, 249 Ga. 365, 367, 291 S.E.2d 233 (1982) (holding that clear and convincing evidence is necessary to support a finding of deprivation in order to remove a child from his or her parent); see also In Re: Jane Doe, 262 Ga. 389, 393(2) and n. 6, 418 S.E.2d 3 (1992); In Re: Baby Girl Eason, 257 Ga. 292, 297(1), 358 S.E.2d 459 (1987); In Re: S.E.H., 180 Ga.App. 849, 851, 350 S.E.2d 833 (1986), In Re: L.H.R., 253 Ga. 439, 445, 321 S.E.2d 716 (1984) (" 'the law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.' " In holding that an infant's family may make the decision to terminate life-support systems without prior judicial approval, we recognized that "[t]he right of the parent to speak for the minor child is ... imbedded in our tradition and common law...." Id.). See also Art. 1, Para. 1, Sec. 1 of

the Constitution of the State of Georgia, "([N]o person shall be deprived of life, liberty or property except by due process of law.)"; Bendiburg v. Dempsey, 909 F.2d 463, 470 (11th Cir.1990).

(b) Permissible State Infringement.

Having determined the interest involved, we look now to the extent of permissible state infringement on that interest. The Supreme Court has made clear that state interference with a parent's right to raise children is justifiable only where the state acts in its police power to protect the child's health or welfare, and where parental decisions in the area would result in harm to the child. See generally Bean, 24 Journal of Family Law, supra, n. 3, at 407-413; Hawk v. Hawk, supra at 580-581; Yoder, supra, 406 U.S. at 230, 92 S.Ct. at 1540 (Amish children would not be harmed by receiving an Amish education rather than a public education); Pierce, 268 U.S. at 534, 45 S.Ct. at 573 (parents' decisions to send their children to private schools were "not inherently harmful.)"; Meyer, supra, 262 U.S. at 403, 43 S.Ct. at 628 (proficiency in a foreign language "... is not injurious to the health, morals or understanding of the ordinary child"); compare Prince v. Massachusetts, *773 321 U.S. 158, 170, 64 S.Ct. 438, 444, wherein the Supreme Court upheld the conviction of a parent who allowed her child to sell religious magazines, finding legitimate state interference designed to prevent "psychological or physical injury " to the child. (Emphasis added)

Likewise, following the analysis of the Tennessee Supreme Court in interpreting its state statutes and constitutions, we find that implicit in Georgia case, statutory and constitutional law is that state interference with parental rights to custody and control of children is permissible only where the health or welfare of a child is threatened. See generally, Hawk v. Hawk, supra at 580; see e.g. In Re: Suggs, supra, (clear and convincing proof of deprivation is necessary before parental rights may be terminated); In Re: L.H.R., supra,

253 Ga. at 445, 321 S.E.2d 716, OCGA § 15-11-81 (the trial court must find clear and convincing evidence of parental misconduct or inability first before considering whether the termination of parental rights is in the child's best interest); OCGA § 19-9-3 (the harm from the termination of the relationship between the child's parents requires the court to "look to and determine solely what is for the best interest of the child or children and what will best promote their welfare and happiness"); OCGA § 19-7-4 (the court may order appropriate measures "for the welfare of the child," if a child is found "under circumstances of destitution and suffering, abandonment ...").[5]

(c) The Constitutionality of Georgia's Grandparent Visitation Statute.

With the foregoing in mind, we find the statute in question falls short both in its apparent attempt to provide for a child's welfare and in its failure to require a showing of harm before visitation can be ordered. First, while as noted above, the state may, in limited instances, interfere with parental decision-making to protect the health or welfare of children, there is insufficient evidence that supports the proposition that grandparents' visitation with their grandchildren always promotes the children's health or welfare. See, Note,

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[5]Contrary to the position of the dissent, the "best interest of the child" standard does not come into play to permit interference with the custody and control of the child, over parental objection, unless and until there is a showing of harm to the child without that interference. To the extent Evans v. Lane, 8 Ga.App. 826, 831, 70 S.E. 603 (1910), cited by the dissent, stands for the proposition that a grandparent might be entitled to custody of the grandchild, rather than a fit parent because it is "the welfare of the little one" which is paramount, that opinion has clearly been overruled by our opinion in Blackburn v. Blackburn, 249 Ga. 689, 692, 292 S.E.2d 821 (1982).

supra, n. 3, Columbia Law Rev. at pp. 123-125; Bohl, Brave New Statutes, supra, n. 3, at 294-298. But see Fernandez, supra, n. 2 at 109-110. While there are, to be sure, many instances where the grandparent- grandchild bond is beneficial to the child, we have found, and the parties cite, little evidence that this is most often the case. It has also been noted that even if such a bond exists and would benefit the child if maintained, the impact of a lawsuit to enforce maintenance of the bond over the parents' objection can only have a deleterious effect on the child. Bohl, supra at 296. Note, Columbia Law Rev. at 124. In so saying, we recognize that there are many grandparents who have a deep and significant bond with their grandchildren, and that we have an explicit policy in this state to "encourage that a minor child has continuing contact with parents and grandparents." OCGA § 19-9-3(d).

However, even assuming grandparent visitation promotes the health and welfare of the child, the state may only impose that visitation over the parents' objections on a showing that failing to do so would be harmful to the child.[6] It is irrelevant, to this constitutional

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[6]The dissent reasons that a less strenuous standard, the rational basis test, applies in determining the constitutionality of state interference under the Grandparent Statute. This is because, the dissent argues, the interference here is not "direct or substantial." We cannot agree. "Allowing the government to force upon an unwilling family a third party, even when the third party happens to be a grandparent, is a significant intrusion into the integral family unit." Herndon v. Tuhey, supra n. 4, at 212 (Covington, J., dissenting). Moreover, this part of the dissent's analysis of the Grandparents' Visitation Statute begs the question. The statute is either constitutional or it is not. It cannot be constitutional, as the dissent argues, because there is only a "little" infringement on family autonomy. Rather, as we have noted, there is no constitutionally permissible infringement of parental rights to custody

analysis, that it might, in many instances be "better" or "desirable" for a child *774 to maintain contact with a grandparent. The statute in question is unconstitutional under both the state and federal constitutions because it does not clearly promote the health or welfare of the child and does not require a showing of harm before state interference is authorized. For the above and foregoing reasons, the trial court's denial of the parents' motion to dismiss is reversed.

Judgment reversed.

All the Justices concur, except BENHAM, P.J., and HUNSTEIN, J., who dissent.

BENHAM, Presiding Justice, dissenting.

I respectfully dissent from the majority's sweeping pronouncement that OCGA § 19-7-3, Georgia's "Grandparent Visitation Statute,"[7] violates the constitutions of both Georgia and the United States. I believe the majority has ignored long-standing rules of statutory construction and, in so doing, has placed Georgia in the

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and control without a showing of harm to the child.

[7]The statute, as pertinent to the facts of the case at bar, states:

(b) Any grandparent shall have the right to file an original action for visitation rights to a minor child ...

(c) Upon the filing of an original action ... under subsection (b) of this Code section, the court may grant any grandparent of the child reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interest of the child. There shall be no presumption in favor of visitation by any grandparent; and the court shall have discretion to deny such visitation rights....

vanguard of a minority of one.[8]

The judicial branch of this state has the constitutional power and duty to declare void legislative acts which violate the U.S. or Georgia Constitution; however, "the conflict between the act and the fundamental law must be clear and palpable before an act of a co-ordinate department of the government will be declared unconstitutional. [Cits.]" Lamons v. Yarbrough, 206 Ga. 50, 57-8, 55 S.E.2d 551 (1949). We must presume that a statute is valid and constitutional until the contrary appears (Williams v. Ragsdale, 205 Ga. 274(2), 53 S.E.2d 339 (1949)), and construe a statute in such a way as to find it constitutional. Garner v. Harrison, 260 Ga. 866, 868, 400 S.E.2d 925 (1991). "Language in a [statute] will be given a reasonable and sensible interpretation in order to carry out the legislative intent and render [the statute] valid. [Cit.]" Mayor & Council, City of Hapeville v. Anderson, 246 Ga. 786, 787, 272 S.E.2d 713 (1980).

Instead of adhering to Georgia's principles of statutory interpretation when faced with a constitutional challenge, the majority simply follows the analysis of the Supreme Court of Tennessee in its decision in Hawk v. Hawk, 855 S.W.2d 573 (Tenn.1993). The Tennessee court based its decision on the right to privacy it found in the Tennessee Constitution in 1992 (id., at 577), the determination that parental rights are a fundamental liberty interest under the Tennessee Constitution (id., at 579), "Tennessee's historically strong protection of parental rights" (id.), and the limitation of Tennessee's authority as parens patriae to interfere with parenting to situations wherein it was necessary to prevent seri-

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[8]No state has declared a grandparent visitation statute violative of the U.S. Constitution. Tennessee, the only other state to find its grandparent visitation statute unconstitutional, based its holding on the Tennessee Constitution alone. Hawk v. Hawk, 855 S.W.2d 573, 582 (Tenn.1993).

ous harm to a child. Id. at 580.[9] However, what *775 may fit Tennessee does not necessarily fit Georgia.

A person in Georgia has a constitutionally protected right to privacy. In addition to the right of privacy found in the penumbrae of the Ninth and Fourteenth Amendments to the U.S. Constitution (Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965)), the Georgia Constitution protects a person's right to privacy. Over 90 years ago, this court assured all persons in Georgia of a right to privacy guaranteed by the state constitutional provision that no person could be deprived of liberty without due process of law. Pavesich v. New England Life Ins. Co., 122 Ga. 190, 197, 50 S.E. 68 (1904). Parents in Georgia, as well as parents throughout the United States, have a fundamental right,

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[9]The Tennessee decision was expressly limited to a determination of the constitutionality of Tennessee's grandparent visitation statute "as it applies to the decision of these married parents to deny the paternal grandparents visitation with their grandchildren." Id., at 575. "When applied to married parents who have maintained continuous custody of their children and have acted as fit parents, [court-ordered grandparent visitation under the statute] constitutes an unconstitutional invasion of privacy rights under the Tennessee Constitution." Id. at 582. The majority does not so limit its condemnation of the Georgia statute. In addition, I wish to note that, in 1993, a trial court ruled that OCGA § 19-7-3(b) was unconstitutional insofar as it authorized court-ordered grandparent visitation after the grandchild had been adopted by a blood relative. The trial court determined that the visitation statute controverted the adoption statute and constituted an unreasonable intrusion upon the adoptive parents' child-rearing autonomy. Massey v. Robinson, Civ. Action No. 93-A-02922-2, Superior Court of Gwinnett County (Stark, J.). This court affirmed that decision without opinion, pursuant to Rule 59 of the Rules of this court. 263 Ga. XXVII.

guaranteed by the liberty interest protected by the Fourteenth Amendment to the U.S. Constitution, to establish a home and direct the upbringing and education of their children without undue governmental interference. See Pierce v. Society of Sisters, 268 U.S. 510, 534, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923). However, the family itself is not beyond regulation in the public interest ... Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control ... [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.... [Prince v. Massachusetts, 321 U.S. 158, 166, 64 S.Ct. 438, 442, 88 L.Ed. 645 (1944)].

"The well-being of its children is of course a subject within the State's constitutional power to regulate...." Ginsberg v. New York, 390 U.S. 629, 639, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968). As parens patriae, the State "has a legitimate interest in protecting those individuals unable to protect themselves." Blackburn v. Blackburn, 249 Ga. 689, 692 n. 5, 292 S.E.2d 821 (1982). "[T]he parens patriae must protect the helpless and the innocent. They are the wards of the court, the hope of the State, and the seed corn of the future." Williams v. Crosby, 118 Ga. 296, 298, 45 S.E. 282 (1903).

Acting as parens patriae, the government can require that children be educated,inoculated against disease, restrained when traveling in motor vehicles, forbidden employment under a certain age, protected from abuse, and required to be indoors during prescribed hours of the night. Thus, it is clear that the State may impose reasonable regulations that do not substantially interfere with the parents' fundamental right. Zablocki v. Redhail, 434 U.S. 374, 386, 98 S.Ct. 673, 681, 54 L.Ed.2d 618 (1978). A legislative action that interferes with the parents' fundamental right must "directly and substantially" interfere with the parental right or "heavily burden" their liberty interest before the

State's action will be subject to strict scrutiny. Lyng v. Castillo, 477 U.S. 635, 638, 106 S.Ct. 2727, 2729, 91 L.Ed.2d 527 (1986). Thus, the less rigorous standard of whether there is a "reasonable relationship to any end within the competency of the State" is applied when the interference is not direct and substantial and the liberty interest not heavily burdened. Meyer v. Nebraska, supra, 262 U.S. 390, 403, 43 S.Ct. 625, 628.

Following Tennessee's lead, the majority maintains that the State's authority to assert itself as parens patriae "is permissible only where the health or welfare of the child is threatened." Majority opinion, p. 773. However, in Georgia, the courts have acted as parens patriae when considering such nonthreatening *776 items as a child's name change (Fulghum v. Paul, 229 Ga. 463, 192 S.E.2d 376 (1972)), and a purported father's petition of legitimation. Mabry v. Tadlock, 157 Ga.App. 257, 277 S.E.2d 688 (1981). In Georgia, the exercise of the parens patriae power has always had as its paramount consideration the best interests of the child (id.), and its exercise has become synonymous with the child's best interests and welfare.[10]

For decades, the courts of this state have recognized that the best interests of the child may often include contact with a grandparent, and have exercised judicial discretion to achieve that goal. In 1910, Judge Richard B. Russell pointed out that "[a widowed] father is not, as a matter of right, in all cases and under all circumstances entitled to the custody of his child," even when he is a proper person to raise a child, because it is "the welfare of the little one" which is paramount. Evans v. Lane, 8 Ga.App. 826, 831, 70 S.E. 603 (1910).

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[10]In Harper v. Ballensinger, 226 Ga. 828, 831, 177 S.E.2d 693 (1970), the court acknowledged the right of a child's sibling to institute a proceeding "in order that the court as parens patriae might inquire into the circumstances of the welfare of the child."

The court noted that "welfare" included "that peacefulness of mind and sweet content upon which its happiness depends," and opined that the child "surrounded by every accessory ... of wealth, might be far less happy than she would be in receiving one tender stroke of the grand[parent]'s hand, or one loving look from the grand[parent]'s heart." Id., at 831, 70 S.E. 603. In Scott v. Scott, 154 Ga. 659, 115 S.E. 2 (1922), this court recognized the right of a trial court to exercise its discretion and award grandparent visitation. In addition, the General Assembly has expressly stated that Georgia has a policy "to encourage that a minor child has continuing contact with ... grandparents who have shown the ability to act in the best interest of the child...." OCGA § 19-9-3(d).

Other states have also noted that a court acts parens patriae when providing for grandparent visitation after finding it is in the best interest of the grandchild to do so. In rejecting a constitutional challenge to the Kansas statute authorizing court-ordered grandparent visitation, the Kansas Court of Appeals recognized the State's interest in protecting its children and assuring they receive proper care. The court concluded that "the parents' rights are subordinate to the State's paren patriae powers and must yield when adverse to the best interests of the child. [Cit.]" Spradling v. Harris, 13 Kan.App.2d 595, 778 P.2d 365 (1989). In Sketo v. Brown, 559 So.2d 381, 382 (Fla.App.1990), the Florida Court of Appeals held that "[t]he state has a sufficiently compelling interest in the welfare of children that it can provide for the continuation of relations between children and their grandparents under terms and conditions so long as it is in the children's best interest." The Supreme Court of New Hampshire has found the "better view" to be that a court, as an instrumentality of the State, "may use its parens patriae power to decide whether the welfare of the child warrants court-ordered visitation with grandparents...." Roberts v. Ward, 126 N.H. 388, 493 A.2d 478, 481 (1985). New York "in its role as parens patriae has determined that, under certain limited circumstances, grandparents should have continuing con-

tacts with the child's development if it is in the child's best interest." People ex rel. Sibley v. Sheppard, 54 N.Y.2d 320, 445 N.Y.S.2d 420, 423, 429 N.E.2d 1049, 1052 (1981). The Indiana Court of Appeals has concluded that Indiana's grandparent visitation statute "interferes with a parent's liberty interest only to observe its duty under the parens patriae doctrine and only upon a finding that it would be in the best interest of the child." Bailey v. Menzie, 542 N.E.2d 1015, 1020 (Ind.App.1989). See also R.T. v. J.E., 277 N.J.Super. 595, 650 A.2d 13 (Ch. 1994) (upholding the New Jersey statute authorizing grandparent visitation if in the best interest of child against constitutional challenge); Herndon v. Tuhey, 857 S.W.2d 203 (Mo. en banc 1993) (upholding the Missouri statute authorizing grandparent visitation if in child's best interest against constitutional challenge); King v. King, 828 S.W.2d 630 *777 (Ky.1992), cert. denied --- U.S. ----, 113 S.Ct. 378, 121 L.Ed.2d 289 (1992) (upholding the Kentucky statute authorizing grandparent visitation against constitutional challenge if visitation is in the best interest of the child); Deweese v. Crawford, 520 S.W.2d 522 (Tex.Civ.App.1975) (rejecting an attack on the constitutionality of the Texas statute authorizing grandparent visitation). The Supreme Court of New Hampshire summarized the dilemma which each of these courts faced: Parental autonomy is grounded in the assumption that natural parents raise their own children in nuclear families, consisting of a married couple and their children ... The realities of modern living, however, demonstrate that the validity of according almost absolute judicial deference to parental rights has become less compelling as the foundation upon which they are premised, the traditional nuclear family, has eroded ... More varied and complicated family situations arise as divorces, and decisions not to marry result in single-parent families; as remarriages create step-families; as some parents abandon their children; as others give them to temporary caretakers; and as still others are judged unfit to raise their own children. One of the frequent consequences, for children, of the decline of the traditional nuclear family is the formation of close personal attach-

ments between them and adults outside of their immediate families ... It ... [is] shortsighted indeed, for this court not to recognize the realities and complexities of modern family life, by holding today that a child has no rights, over the objection of a parent, to maintain a close extra-parental relationship.... [Roberts v. Ward, supra, 493 A2d 478, 481, citing Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed, 70 Va.Law Rev. 879 (1984).]

The Georgia grandparent visitation statute confers standing upon grandparents to apply to a court for the privilege of visiting with their grandchildren. Sachs v. Walzer, 242 Ga. 742, 251 S.E.2d 302 (1978). It does not confer a substantive or absolute right of visitation, but simply establishes a procedural vehicle through which grandparents may ask the court to allow visitation. It does not presume the existence of a beneficial relationship between grandparents and grandchildren. See Hawk v. Hawk, supra, 855 S.W.2d at 581, where the Tennessee Supreme Court sought "to avoid the 'unquestioning judicial assumption' that grandparent-grandchild relationships always benefit children...." Rather, it requires grandparents to establish "special circumstances which make such visitation rights necessary to the best interest of the child." OCGA § 19-7-3(c). In essence, the statute codifies what Georgia courts have been doing for years--providing for grandparent visitation after it is established that such visitation is in the best interests of the child.

Our statute is a legitimate exercise of the General Assembly's power to balance the competing interests of children, their parents, and their grandparents. The statute is an embodiment of the expressed policy of this state "to encourage that a minor child has continuing contact with ... grandparents who have shown the ability to act in the best interest of the child...." OCGA § 19-9-3(d). The limited infringement upon parental rights by the Grandparent Visitation Statute is not of the magnitude of the infringement of parental rights

that was involved in In re Suggs 249 Ga. 365, 291 S.E.2d 233 (1982), cited by the majority. In that case, the permanent termination of parental rights was at issue; in the case at bar, we are examining a statute that provides a means by which grandparents can seek temporary visitation when that is found to be in the child's best interest.[11] Our statute does not directly or substantially interfere with the parental right, and is rationally related to a legitimate legislative goal. Under the rules *778 of statutory construction when the constitutionality of legislation is questioned, it is constitutional.

For over 80 years the appellate courts of Georgia have recognized the authority of a trial court to exercise its discretion and provide for visitation between grandparents and grandchildren when it was in the best interest of the children involved. See Scott v. Scott, 154 Ga. 659, 115 S.E. 2, supra; and Evans v. Lane, 8 Ga.App. 826, 70 S.E. 603, supra. The majority now holds that the legislative act giving grandparents standing to ask for visitation and codifying the judicial practice of providing for such visitation when it was in the child's best interest is unconstitutional.

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[11]The majority also cites In re L.H.R., 253 Ga. 439, 321 S.E.2d 716 (1984), which involved the circumstances under which life-support systems might be removed from "a terminally ill [infant] existing in a chronic vegetative state with no hope of development of cognitive function." Id. This court determined that the child's parent or legal guardian could exercise the constitutional right to refuse or to terminate medical treatment, but only after the attending physician rendered a diagnosis and prognosis of terminal illness with no hope of recovery and current existence in a chronic vegetative state with no reasonable possibility of attaining cognitive function, and two disinterested physicians concurred. Thus, the parental right concerning treatment of the child was not as free from interference as the majority might hope.

"While the court may not agree with the wisdom of the statute, we are not authorized to second guess the legislature." Celotex v. St. Joseph Hosp., 259 Ga. 108, 111, 376 S.E.2d 880 (1989) (Hunt, J., dissenting). As I cannot join my colleagues in second-guessing the legislature, I dissent from their holding that the Grandparent Visitation Statute is not constitutional. I am authorized to state that Justice HUNSTEIN joins this dissent.

SEARS, Justice, concurring.

Both the majority and the dissent say much of Georgia's "Grandparent Visitation Statute", OCGA § 19-7-3, that today we declare unconstitutional. The statute makes the judicial process available for grandparents to use to require their children to provide them visitation rights with their grandchildren upon a showing of "special circumstances" which make such visitation rights necessary to the best interest of the child. OCGA § 19-7-3(c).

In sum, the dissent says that grandparents can be another layer of special people for children. I fully agree. The family requires the most delicate mixture of nature and convention, of human and divine, to subsist and thrive.

It's base may be mere bodily reproduction, but its purpose is the formation and maintenance of civilized human beings. Grandparents can be important to the family mixture because children must receive knowledge of the things of the past as well as prescriptions for what ought to be in order to resist the philistinism of the present. Having found wisdom, learned patience, and journeyed in faith, many grandparents have much to give their grandchildren in the way of a vision of the world, as models of action and may, as well, provide children with a very profound sense of connection with others.

However, as important as grandparents can be in the lives of their grandchildren, the relationship between parent and child is paramount. For this reason I can

not believe in either the constitutionality or the political correctness of any law that allows a court, using its own notions of what "special circumstances" are, to pierce the delicate, complex and sacred unity of parent and child against the wishes of fit parents and without a showing of absolute necessity. While I have no quarrel with governmental interference where a parent's conduct may injure a child emotionally or physically, interference on less than those grounds is contrary to our common law tradition of protecting the nuclear family as the foundation of society and leaving fit parents the exclusive right to determine what is in their children's best interest. Far from being outmoded, that tradition is critical today. In this indifferent, lackluster and frightened time, we need to protect the sanctity and shore up the security provided by our families more than at any other time I can think of.

The American family as an institution is vulnerable for many reasons, not the least of which are the weaknesses of its members who are, after all, only mortals. Implicit in *779 the Western family as we know it, which generally consists of parents and their young children, are deep distresses that often accompany living in intimate, revealing relationships with minimum regulation and oversight from government or other entities. Parents can perpetuate many subtle as well as overt outrages against their children, from neglect to mayhem. When parental conduct is so vile as to injure a child, and parents can not or will not reach out to others for help, government not only is authorized but is compelled to invade the intimacy and privacy of the parent-child relationship in order to provide children with a healthy alternative.

Even in so-called "good families", the engagement of child with mother and father, and husband with wife, can be intense, causing disappointment and pain. Mothers and fathers often feel their children's misfortunes and failures keenly; their rejection by peers, their abuse at the hands of callous adults, their awkwardness and their miscalculations. There is often wounded pride and

astonished unbelief when the bright promise of the baby fades into the ordinariness of the school child. In the family the young adult struggles to shake off the bonds of parental love that expresses itself in solicitude and supervision. And for the parent whose child has made the necessary leap to freedom, there is the pain of letting go, of turning back to the silent house, the empty bed, the abandoned books, dolls and baseball bats.[12]

Turn all of this over, however, and in the vast majority of homes you will also discover tender devotion, the deepest pride and the most exultant joy--all experienced in the relationship between parent and child. It does not matter whether our child is brilliant or deficient, beautiful or homely, perfect or deformed, good or bad--he or she is ours, and most parents are committed to their children lastingly. Whether we rear our children on the right side of the tracks or the wrong, whether we are dunderheaded in politics or forward- looking enough to please our adventurous offspring, whether we are able to provide them with the things they think they need or we are limited to providing them with the things we know they must have, they are ours and, absent abuse and neglect, parents and their children have the right to "remain together without the coercive interference of the awesome power of the state." Duchesne v. Sugarman, 566 F.2d 817, 825 (1977).[13] Our law has always recognized that the relationship between parents and their children is the most mutually beneficial relationship possible, in an imperfect world, and in this country parents' decisions concerning visitation with a grandparent or anyone else have always been constrained, if at all, by moral and religious forces rather than legal ones.

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[12]See generally Cox, "Marriage and the Family" Readings on the Psychology of Women (Harper & Row, 1972).

[13]Id. at 129.

If the relationship of parent to child were a more superficial one--as well might be the case under any statute that would involuntarily relieve a couple of the care of their young in favor of others under a subjective showing of "special circumstances"--such profound feelings as I have described could be diluted to mere concern, and for some the concern could become indifference.

Relieved of intensity and stripped of privacy, the relationship between parents and their children could be less binding, not more, creating another wedge between parent and child and another excuse for parents to shirk their responsibilities. Furthermore, when the parent-child relationship is curtailed, even to accomplish a goal as laudable and seemingly benevolent as ensuring a child's connection with the parents of his mother or his father, over time some parents could come to feel less committed to their young in a time where more commitment is needed, and less inclined to ensure that their children got the essentials: authority, responsibility, attention and love.

Between parent and child, there is no monster like separateness. It can grow even faster than children, shutting first the heart, than the home, then history. The rights that *780 some grandparents may seek under the liberal rules of the statute invalidated today could separate fit parents from responsibility for and authority over their children, thereby undermining the privacy and primacy of the American family. The statute cannot be allowed to stand.

APPENDIX II. TRIAL COURT OPINION

IN THE SUPERIOR COURT OF DOUGLAS COUNTY

STATE OF GEORGIA

Parkinson [sic] v. Brooks et al., No. 93-9604

[Filed April 29, 1994]

ORDER AND OPINION ON MOTION TO DISMISS

This ORDER resolves a pretrial motion in a case in which no evidence has yet been presented. For purposes of the motion, the following facts are clear:

1) Defendants are the natural parents of the subject child and are currently married.
2) Plaintiff is the maternal grandmother.
3) Defendants jointly desire to preclude contact between the subject child and the plaintiff, and, as a result, plaintiff brings this action for court-ordered grandparent visitation pursuant to O.C.G.A. §19-7-3.

Defendants contend that the above-enumerated grandparent visitation statute is unconstitutional in violation of the United State and Georgia Constitutions and that it should be so declared. Both parties filed trial briefs.

Defendants rely primarily on a group of United States Supreme Court cases which stand directly and indirectly for the proposition that the right to raise one's children involves constitutional rights protected by the fourteenth amendment to the United States *2 Constitution. They urge additionally that parental autonomy over children is protected through privacy rights under both the United States and Georgia Constitutions. Importantly, as none of these cases directs itself to the type of infringement upon the parent and child relationship that potentially results from court-ordered grand-

parent visitation,[1] the defendants lean heavily upon the decision of the Tennessee Supreme Court in Hawk v. Hawk, 855 S.W.2d 573 (1993) for persuasive, if secondary authority and support.

Defendants' contention that care of and authority over children by their parents involves fundamental liberty interests is, by now, beyond dispute; but it should also be noted, as was pointed out by the Tennessee Court in Hawk v. Hawk, supra, that the *3 United States Supreme Court "has never entertained a case involving the

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[1]Meyer v. State of Nebraska, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) struck down a criminal statute proscribing the teaching of (or by use of) foreign language in public or private schools.

Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) struck down a criminal statute prohibiting parents of children of specified ages from providing education in any manner other than enrollment in public schools.

Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944) upheld a criminal status which prohibited parents from permitting or compelling their children to work in violation of child labor laws as against a challenge that the conduct in question was protected by constitutionally guaranteed religious freedom.

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) construed a criminal compulsory school attendance statute. While not striking down the law, the Court created an exception on constitutional grounds related to religious freedom for the Amish and other religious orders which might be similarly situated.

The privacy-related cases cited by defendants, while addressing issues touching upon the sanctity of family matters, are even further from dealing with the particular type of infringement upon the parent/child relationship that is at issue in this proceeding.

right to visitation of grandparents or third parties."[2]

Further, in some of the same cases cited by the defendants,[3] the United States Supreme Court has made it clear that the protection of the autonomy of parents is by no means immune from state interference.

In King v. King, 828 S.W.2d 630 (1992), the Kentucky Supreme Court construed a grandparent visitation statute which was virtually identical to the one struck down in Hawk v. Hawk, supra. In a 5-2 decision, the Kentucky Court reached the opposite result from that reached by the Court in Tennessee.[4] After careful analysis of these decisions of our two neighboring states and comparison of the statutes there in question with the Georgia statute under construction in this case, it is clear to this court that the Georgia statute should survive constitutional scrutiny for reasons peculiar to its own content.

Both Kentucky Revised Statutes Annotated §405.021 and Tennessee Code Annotated §36-6-301 allowed the appropriate courts in each state to grant reasonable visitation to grandparents if the Court determined that to do so was in the "best *4 interest(s)" of the child. No

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[2]Hawk v. Hawk, supra, at 577.

[3]In Pierce v. Society of Sisters, supra, at 45 S.Ct. at 573, the Court noted the right of the State to regulate education and "to require that all children of proper age attend some school. . ."

And in Prince v. Commonwealth of Massachusetts, supra, the court stated, at 64 S.Ct. at 442, that ". . . the state has a range of power for limiting parental freedom and authority in things affecting the child's welfare. . ."

[4]The dissenters in King v. King, supra, were unpersuasive to their Kentucky Court colleagues.

The Tennessee Court, however, was clearly influenced by the King dissent. Hawk v. Hawk, supra, at 582.

other or further test or standard was articulated by either statute, nor was any specific burden of proof expressed.

The Kentucky Court was satisfied that the statutory scheme adequately protected due process rights since visitation could not be ordered "until an action is filed in Circuit Court, a hearing is conducted before a judge or commissioner, and findings of fact and conclusions of law entered finding that the best interests of the child will be served by granting or denying visitation." King v. King, supra, at 632. The United States Supreme Court "was asked to review the King case . . . and declined." Hawk v. Hawk, supra, at 577.

The Tennessee Court, after reviewing the United States Supreme Court precedents which the defendants refer to here, invalidated the Tennessee statute by authority of the Tennessee State Constitution under a privacy theory. The Court held that child-rearing decisions by parents which "do not substantially endanger the welfare of their children" were protected from state interference "When applied to married parents who have maintained continuous custody of their children and have acted as fit parents . . ." Hawk, supra, at 582.

The Tennessee Court, in Hawk, and the Kentucky dissenters, in King, propounded the theory that harm to the child must be shown before state interference in the parent/child relationship might be permitted. A law review article[5] cited four times in the Hawk decision and in each of the King dissents reasons that ". . . the grandparents' request and justification for visitation should be subject to scrutiny and should be proved *5 necessary to the welfare of the child." Bean, Grandparent Visitation: Can the Parents Refuse? 24 U.Lou.J.Fam.L. 393 (1985)[6] (emphasis added).

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[5]Numerous other scholarly articles were cited in the Hawk and King options.

[6]Quoted from Justice Lambert's dissent in King v. King, supra, at 634.

The Georgia statute provides in relevant part that "upon proof of special circumstances which make such visitation rights necessary to the best interests of the child" grandparents could be awarded reasonable visitation (emphasis added). The statute further provides as follows: "There shall be no presumption in favor of visitation by any grandparent; and the Court shall have discretion to deny such visitation rights."[7]

In Santosky v. Kramer, 455 U.S. 745, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982), the United States Supreme Court reiterated the existence of fundamental liberty interests in matters of family life. But by approving a clear and convincing evidence standard for termination of parental rights cases based on neglect[8] the Court also reiterated that the State's interest in protection of children was a compelling one which sometimes outweighs the parents' right to autonomy. And in so noting, Justice Blackmun commented that "If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs." Santosky, supra, at 102 S.Ct. at 1395.

Georgia Law has long recognized that parents can lose their right to present custody and control of their children (even to third parties), by unfitness, or by other *6 means[9] or through a finding of deprivation pursuant to the Juvenile Court Code. Without attempting a review of other limitations which the state does or may place on parent/child relationship, it would appear that court-ordered visitation by grandparents is less intrusive than loss of parental custody and control, and conspicuously less intrusive than complete

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[7]O.C.G.A. §19-7-3(c).

[8]The issue in Santosky was whether a New York statute providing for a preponderance of evidence standard in such cases was constitutionally sufficient. The Court decided on due process grounds that it was not.

[9]See O.C.G.A. §§ 19-7-1 and 19-7-4.

and permanent termination of parental rights.

As such, the Kentucky Supreme Court may have had every right to sustain its grandparent visitation statute even though based on a simple "best interests" standard. Notwithstanding, the Tennessee Supreme court certainly protected its right to reach the opposite result by grounding its decision in its State's Constitution.

But the Georgia statute is not a simple "best interests" standard. It sets out in clear terms what must be proved by grandparents before wishes of parents to preclude contact may be overridden. In the absence of any contrary guidance from the Georgia Supreme Court prior to the trial of this case, this court reads our statute to require use of the following procedural mechanisms in order to insure due process in its application:

1) The Court will determine whether "special circumstances" exist in relation to the grandparent's request for visitation and, if so, such special circumstances will be articulated with specificity in findings of fact (unless waived by the parties).

2) In the event of the existence of such special circumstances, the court will balance the parents' fundamental liberty interest against the State's interest in protecting the welfare of the child, and in so doing, reach conclusions of law as to whether the *7 special circumstances make the requested visitation rights "necessary to the best interest of the child."[10]

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[10]The Georgia Supreme Court is free, if it chooses, to articulate a test for statutory construction while leaving the statute in place. As a Juvenile Court Judge by trade, two cases in which this was done readily come to mind. In Florida Publishing Co. v. Morgan, 253 Ga. 467,473 (1984), the Court created a test to balance constitutional rights with state statutory rights in construing O.C.G.A. §15-11-28(c). In State v. M.M., 259 Ga. 637 (1989), the Court set out a three-part test for application of O.C.G.A. §15-11-39 in connection with non-constitutional issues.

The question remains as to what standard of proof should be shouldered by grandparents to seeking such visitation in these cases. No standard is specified in the statute.

O.C.G.A. §15-11-81(a) sets out a "clear and convincing" evidence test in termination of parental rights cases. As a matter of State law, Georgia cases have long required application of a clear and convincing standard before granting custody of a child to a third party based on parental unfitness. See, e.g., White v. Bryan, 236 Ga. 349 (1976). Likewise, our case law has required proof by clear and convincing evidence in deprivation proceedings in the Juvenile Courts. See, e.g., In re:J.C.P., 167 Ga. App. 572 (1983). On the use of the clear and convincing evidence standard in Georgia parent/child relationship cases, see generally Blackburn v. Blackburn, 249 Ga. 689 (1982).

Although legislatures may specify a standard of proof in a statutory enactment (so long as the standard legislated is constitutionally sufficient), Justice Blackmun, noted, in Stantosky v. Kramer, supra, at 102 S.Ct. at 1396, that "the degree of proof required in a particular type of proceeding 'is the kind of question which has traditionally been left *8 to the judiciary to resolve.' Woodby v. INS, 385 U.S. 276,284, 87 S.Ct. 483,487, 17 L.Ed.2d 362 (1966)."[11]

Keeping in mind the principles discussed herein as well as the history of the Georgia law in limiting intrusions into and in providing protection for the parent/child relationship, this Court will impose a clear and convincing evidence burden upon the plaintiff unless directed otherwise before trial by the Georgia Supreme

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[11]In footnote 3 of Santosky, supra, at 102 S.Ct. at 1392, 1393, Justice Blackmun lists fifteen states which had legislated a clear and convincing standard in termination of parental rights cases. He also names seventeen jurisdictions which had done so by court decision.

Court.

Defendants herein cite, in their trial brief, the decision of the Honorable Homer M. Stark of the Gwinnett Superior Court declaring the Georgia statute unconstitutional as applied to an action brought after finalization of an adoption (that judgment was affirmed by the Georgia Supreme Court pursuant to Rule 59. Massey v. Robinson, S93A1986, and Robinson V. Massey, S93A1987, decided February 7, 1994). This Court declines comment as to whether or not an alternative analysis, constitutional or otherwise, should apply in that category of cases.

For the reasons set out above, the constitutional challenge is OVERRULED, and the defendants' motion to dismiss is, hereby, *DENIED*.

SO ORDERED THIS 29th DAY OF APRIL, 1994.

S/ Stephen J. Messinger
JUDGE, SUPERIOR COURT OF DOUGLAS COUNTY
by designation

APPENDIX III. STATUTE

CODE OF GEORGIA
TITLE 19. DOMESTIC RELATIONS
CHAPTER 7. PARENT AND CHILD RELATIONSHIP GENERALLY
ARTICLE 1. GENERAL PROVISIONS

19-7-3. Grandparents' visitation rights

(a) As used in this Code section, the term "grandparent" means the parent of a parent of a minor child, the parent of a minor child's parent who has died, and the parent of a minor child's parent whose parental rights have been terminated.

(b) Any grandparent shall have the right to file an original action for visitation rights to a minor child or to intervene in and obtain visitation rights in any action in which any court in this state shall have before it any question concerning the custody of a minor child, a divorce of the parents or a parent of such minor child, a termination of the parental rights of either parent of such minor child, or visitation rights concerning such minor child or whenever there has been an adoption in which the adopted child has been adopted by the child's blood relative or by a stepparent, notwithstanding the provisions of Code Section 19-8-19.

(c) Upon the filing of an original action or upon intervention in an existing proceeding under subsection (b) of this Code section, the court may grant any grandparent of the child reasonable visitation rights upon proof of special circumstances which make such visitation rights necessary to the best interests of the child. There shall be no presumption in favor of visitation by any grandparent; and the court shall have discretion to deny such visitation rights. An original action requesting visitation rights shall not be filed by any grandparent more than once during any two-year period and shall not be filed during any year in which anoth-

er custody action has been filed concerning the child. After visitation rights have been granted to any grandparent, the legal custodian, guardian of the person, or parent of the child may petition the court for revocation or amendment of such visitation rights, for good cause shown, which the court, in its discretion, may grant or deny; but such a petition shall not be filed more than once in any two-year period.